

DATE: July 1, 1999

CASE NO: 1996-CAA-0010

DAVID MOURFIELD  
Complainant

v.

BETHLEHEM ADVANCED MATERIALS CORPORATION  
Respondent

**RECOMMENDED ORDER APPROVING SETTLEMENT AND APPROVING  
WITHDRAWAL OF COMPLAINT**

This case arises under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. §5851 ("ERA"), the Toxic Substances Control Act, 15 U.S.C. §2622 ("TSCA"), the Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. §9601 ("CERCLA"), the Clean Air Act, 42 U.S.C. §7622 ("CAA"), the Solid Waste Disposal Act, 42 U.S.C. §6971 ("SWDA") and the Safe Drinking Water Act, 42 U.S.C. §300j-9(I) ("SCWA"). A "Settlement Agreement" was executed by Complainant and Respondent on June 24, 1999, and was submitted for my review and approval. The Settlement Agreement is attached hereto as JX 1 and is incorporated herein by reference.

Pursuant to the requirements of the Act and Regulations, I have reviewed the parties' settlement agreement and determined that it constitutes a fair, adequate and reasonable settlement of the complaints. 42 U.S.C. § 5851(b)(2)(A) (1988). *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.3d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2. The Settlement Agreement provides that Complainant releases Respondent from claims arising under the CAA, CERCLA, ERA, SDWA, SWDA and TSCA. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated those laws. *Webb v. Numanco, LLC*, Case No. 98-ERA-27 (ARB January 29, 1999), slip op. at 2; *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2.

The General Release contains a confidentiality provision which provides, *inter alia*, that:

"The parties agree to keep the terms of this Agreement confidential, and that if asked by anyone, they will respond only that the matter has been resolved. Mr. Mourfield agrees not to disclose or cause or allow to be disclosed any of the terms,

conditions, amounts or any other details of this Agreement. In this regard, nothing shall preclude Mr. Mourfield from fully disclosing the terms of this Agreement:

(a) As required by law, subpoena, order or civil investigative demand, provided BAM is given as much advance notice of the order and disclosure as the circumstances permit; and

(b) Pursuant to an inquiry from the Internal Revenue Service or any other taxing authority.

Mr. Mourfield and BAM acknowledge and agree in good faith that any breach of this Paragraph shall constitute a material breach of this Agreement. Mr. Mourfield and BAM further acknowledge and agree that any violation of the agreements and covenants contained in this Paragraph will damage the other party irreparably.

BAM agrees in good faith that the terms of this Paragraph are mutual with the provision that it is not precluded from disclosing the existence or term of this Agreement with those persons connected with BAM who have a need to know for legitimate business purposes or if required for legal purposes, and will not disclose this information to unauthorized persons.

The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA) “requires agencies to disclose requested documents unless they are exempt from disclosure . . .” *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspections Services*, 96-TSC-5, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. *see also Pulmlee v. Alyeska Pipeline Services Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 9, 10, Sec. Final order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; *Davis v. Valley View Ferry Authority*, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, June 28, 1993, slip op. at 2 n.1 (parties’ submissions become part of the record and are subject to FOIA); *Ratliff v. Airco Gases*, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, June 25, 1993, slip op. at 2.

The records in the instant case are agency records which must be made available for public inspection and copying under FOIA. In the event a request for inspection and copying of the record is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed.

The confidentiality provisions of the Settlement Agreement could also constitute a “gag provision” that is unacceptable as being against public policy if it precludes Complainant from

communicating with federal or state enforcement agencies concerning alleged violations of law. However, I interpret this language (quoted above) as not preventing Complainant from communicating with, or providing information to, state or federal authorities about suspected violations of law involving Respondent. Therefore, the General Release does not contain an invalid gag provision. *Thorton v. Burlington Environmental and Phillip Environmental*, 94-TSC-2, Sec. Final Order Approving Settlement and Dismissing Complaint, Mar. 17, 1995.

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7, ARB Case Nos. 96-109, 07-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. Paragraph 10 of the Settlement Agreement provides that the written agreement constitutes the entire agreement between the parties. As this is the only settlement documentation submitted to me, I find that there were no other settlement agreements arising from the same factual circumstances which formed the basis for this claim.

My review of the agreement leads me to conclude that it is fair, adequate and reasonable. The agreement is approved and upon compliance by Respondents with its terms, the complaint is dismissed.

### **ORDER**

Accordingly, it is hereby **RECOMMENDED** that the Settlement Agreement between the Complainant B. David Mourfield II and the Respondent Bethlehem Advanced Materials Corporation, be **APPROVED** and, upon completion of the payments by Respondents, that the complaint filed in this matter be **DISMISSED WITH PREJUDICE**.

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**PAUL H. TEITLER**  
Administrative Law Judge

PHT/cam  
Camden, New Jersey

### **NOTICE**

This Recommended Decision and Order will automatically become the final order of the Secretary, unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this

Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).